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### LOCAL AND TRANSITORY ACTIONS IN PRIVATE INTERNATIONAL LAW.

If the world were organized into one state and governed by a uniform system of law, there would manifestly be no need for international law, either public or private. The Roman state, in so far as it attempted to establish a universal dominion, did not recognize that any system of law other than the Roman could control its obligations, or that of its citizens, to other states or the citizens of other states. But in the very process of extending the sway of its empire to other peoples, it was discovered that the extension of a uniform non-yielding system of law presented difficulties quite commensurate with the extension of a unique authority. Accordingly, in adapting the laws of Rome to transactions with or between non-citizens, many of whom were living under a state of society different from that of Rome, a *jus gentium* developed, somewhat paradoxically, within the Roman state itself. In great measure it was developed from a conflict of laws and local customs without a conflict of sovereignty.

The mediaeval period also witnessed the development of sovereign states with a diversification of law not at all coextensive with their state boundaries. This was due partly to the common origin of the private law of Europe, partly to the loosely organized character of the state itself. Legislative power, especially in Italy and France, was local before it became central.

The result was that conflicts of law and jurisdiction within the state became frequent, and, as trade increased, inevitable. The extra-jurisdictional recognition and enforcement of rights was therefore rendered necessary by reason of the structure of the state itself, not as in England, a new and unusual problem for the judiciary to solve whenever the happening of an event in issue made the application of English law inappropriate. Lainé has said that at a period when the multiplicity of statutes or customs was exciting conflicts of law in Europe, especially in Italy, France, Germany and the Netherlands, for the solution of which an array of rules was growing up, called the theory of the statutes, England, wherein the Anglo-Saxon customs were becoming blended with the Norman, enjoyed a system of laws almost uniform.<sup>1</sup>

As conflicts of law within England were prevented by the paucity of foreign trade relations prior to the period of commercial expansion in the sixteenth and seventeenth centuries, the courts adopted an attitude of the most primitive, one would almost be inclined to say savage, conservatism. Thus we read in the Year Book, 2 Edward II, that a writ of debt was brought, in 1308, upon a bond executed in Berwick, Scotland, and the judges decided that "because it was made at Berwick where this Court has not cognizance, it was awarded that John (the plaintiff) took nothing by his writ."<sup>2</sup>

It would not be fair to say that as time went on, the local limitation of jurisdiction in English courts resulted in the exclusion of jurisdiction over foreign transactions, or the causes of action arising out of them. We are warranted in asserting, however, that the procedural rules allocating the trials of action according to the place where the transactions took place, did exercise an appreciable influence upon the recognition accorded by the common law to rights arising in a foreign jurisdiction.

Even today, in this country at least, the law seems to be in a transitory state, moving in the direction of progress, but with old conceptions still entrenched in many jurisdictions. We

<sup>1</sup> *Journal de droit international privé*, 1896, p. 484.

<sup>2</sup> Selden Society Publications, 110-111.

may, therefore, examine with profit a class of cases in which, partly by judicial decision, partly by legislation, the progressive tendency has become manifest.

We have seen that originally all actions in England were considered local. The place therefore where the facts in issue arose was required to be alleged and the venue of the action correctly laid accordingly. It is said that the rule arose out of the early practice which required a case to be tried by the jury of the vicinage, who were presumed to have knowledge of the facts and of the parties.<sup>3</sup> The English judicial system developed from one of local to one of central or royal administration, with a reference of the dispute to local sworn men.<sup>4</sup> By the statute of 16 and 17 Charles II, cap. 8 (1677) it was provided that "after verdict, judgment should not be stayed or reversed for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action was laid." The venue could thereafter be laid in any county in England except where the plaintiff's case was conceived as having some necessary connection with a particular locality. In the latter case alone, the true venue had to be laid. The categories of local and transitory actions were then adopted in order to distinguish cases which were so intimately connected with a particular place as to require the venue to be laid there, from cases which could be tried in any county in England. But where the cause of action did not arise in England at all, but in some foreign country, no jury could be summoned from the foreign place. Accordingly, the distinction between local and transitory actions would not logically apply because it was developed to determine venue *within* the realm and not to discover whether an English court had cognizance. What was originally a rule to accomplish a better administration of justice could only prevent the exercise of any jurisdiction whatever in a case in which the nature of the action was determined to be "local." Indeed something of this problem was sensed by the judges even before the statute of

<sup>3</sup> See Mitchell, J., in *Little v. Chicago & St. Paul Ry. Co.*, 65 Minn. 48 (1896).

<sup>4</sup> Jenks, *A Short History of English Law* (1913), pp. 48-49.

Charles II; for in Elizabeth's time, when part of the facts to be proved occurred out of the realm, judgment was not withheld because the jury would be called upon to determine the foreign as well as the local issue of fact, otherwise it should not be tried at all.<sup>5</sup> Later, when confronted with the rule in actions where the subject-matter itself and not the mere proof was bound up with a foreign jurisdiction, the decision was more difficult; either the rule must fail or every court in England must be deemed incompetent, to the discomfiture of suitors domiciled in England. But the earliest decisions gave no consideration to international intercourse and when injury to real property out of England was concerned, the plaintiff was held "not relievable in any ordinary court of law."<sup>6</sup> Perhaps this was characteristic of the judicature of the period, this forcing of external issues into the internal moulds for which they were not at all designed. It is therefore not entirely a coincidence that the jurist who sought to grapple with so many of the early technical rules of the common law in order to fit them to the needs of an expanding commerce should also have brought his influence to bear against this one. Lord Mansfield went out of his way in *Mostyn v. Fabrigas*,<sup>7</sup> to refer to two earlier decisions (not directly reported) wherein he had entertained jurisdiction of actions for damages to real estate lying in Nova Scotia and Labrador respectively, where no local courts had yet been instituted. The plaintiff in the case before him was suing for assault and false imprisonment, so his remarks were *obiter*, but he characterizes the distinction between local and transitory actions as a fiction invented simply for the mode of trial:

"to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the case shall not be tried."<sup>8</sup>

But Lord Mansfield's opinion did not prevail and the old rule was firmly established in *Doulson v. Matthews*,<sup>9</sup> because, said

<sup>5</sup> See Dowdale's Case, Cokes Rep., Part VI, 47 b 1 (1606).

<sup>6</sup> Skinner v. East India Company, 6 Howell's State Trials, 710, 719 (1665).

<sup>7</sup> 1 Cowp. 161 (1774); s. c., 1 Smith's Leading Cas. 591.

<sup>8</sup> *Ibid.*, p. 610, and see the historical note, 1 Smith's Leading Cas., p. 615.

<sup>9</sup> 4 Term. R. 503 (1793).

Mr. Justice Buller, it was "too late" to consider whether the distinction were "wise or politic."

The principle was fully considered by our own Chief Justice Marshall in an action brought against Thomas Jefferson for a trespass alleged to have been committed in New Orleans while he was President, and Lord Mansfield's brave but futile effort is thus commented on:

"One of the greatest judges who ever sat on any bench and who has done more to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction between taking jurisdiction in cases of contract respecting lands, and torts committed on the same lands, that he attempted to abolish it."<sup>10</sup>

But the principle of *stare decisis* was too well intrenched even in the formative period of American jurisprudence. It has been remarked as strange that the great Chief Justice should have given more weight to the English decisions rendered after the Revolution than to those of Lord Mansfield rendered before it. In *Little v. Chicago & St. Paul Railway Co.*,<sup>11</sup> action was brought to recover damages to real estate situated in Wisconsin, caused by the negligent operation of the defendant's railroad. Mitchell, C. J., in writing the opinion said that until *Doulson v. Matthews*, the law had not been fully settled in England. The court refused to follow the rule because it was in no sense a rule of property:

"If the Courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why courts of the present day should deem themselves slavishly bound by those limitations."<sup>12</sup>

The English courts have not been moved by the considerations set forth by the Minnesota court, although the Judicature Act of 1873 abolished all local venues for the trial of actions. In *British South Africa Co. v. Companhia de Mocambique*,<sup>13</sup> the plaintiff sought damages because it had been ejected by the

<sup>10</sup> *Livingston v. Jefferson*, 1 Brock. 203; s. c., Fed. Cas. 8411 (1811).

<sup>11</sup> 65 Minn. 48, 33 L. R. A. 423 (1896).

<sup>12</sup> *Ibid.*, p. 53.

<sup>13</sup> (1892) 2 Q. B. 358; reversed in the House of Lords (1893), A. C. 602.

defendant from certain lands and mines in South Africa. There was a disputed claim of possession and the plaintiff besides damages and an injunction sought a declaration that it was the lawful possessor. On appeal, the plaintiff abandoned all claims except for damages and the Court of Appeal ordered a trial upon the ground that the Judicature Act had enabled the court to take jurisdiction. The House of Lords, however, reversed this ruling, holding that the effect of the Judicature Act was procedural only, and could not give jurisdiction in a case where it had been lacking prior to the statute.

We are therefore obliged to accept the distinction between local and transitory actions as still in effect in England, as indeed it is the preponderating rule also in the United States.<sup>14</sup>

In Chief Justice Marshall's own state of Virginia, the rule was abolished by statute as early as 1819.<sup>15</sup> It has also been abolished in Texas<sup>16</sup> and more recently also in New York.<sup>17</sup> Besides these statutory changes, the doctrine has been subjected to important modifications and exceptions. Thus where an act is performed in one state, causing injury to real property in another state, the action may be brought in either jurisdiction.<sup>18</sup> Of course, the reason of the rule, if indeed it be a rule of reason, is just as applicable in this class of cases as where the act occurred in the foreign jurisdiction; for the court has no greater power to put one or the other of the parties in actual possession of the property where the act of injury was begun in the local jurisdiction than it would have where the act occurred at the foreign situs of the property.

<sup>14</sup> *Ellenwood v. Marietta Chair Co.*, 158 U. S. 107 (1894); *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137 (1891); *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560 (1890); *Niles v. Howe*, 57 Vt. 388 (1885).

<sup>15</sup> 1 Rev. Code 1819, p. 450, Sec. 14. See opinion of Green, J., in *Payne v. Britton's Executors*, 6 Rand. (Va.) 101 (1828), where the extent of the abolition of the distinction between local and transitory actions affected by this act is discussed.

<sup>16</sup> R. S. 1198, as interpreted by *Armendiaz v. Stillman*, 54 Tex. 627 (1881).

<sup>17</sup> Code of Civil Procedure, as amended 1913, Sec. 982a.

<sup>18</sup> *Rundle v. Delaware & R. Canal*, 1 Wall, Jr., 275; s. c., Fed. Cas. 12,139 (1849); *Stillman v. White Rock Mfg. Co.*, 3 Wood & M. 538, Fed. Cas. 13,446 (1847); *Ruckman v. Green*, 9 Hun 225 (1876); *Thayer v. Brooks*, 17 Ohio 489 (1848). In the *Rundle* case (*supra*), the court says: "The difficulty is caused not by any principles of international law, but by the common law which is the same in both states."

A second exception permits the owner of land in a foreign jurisdiction to sue in the local forum where the trespass has materialized into an asportation of timber, or the conversion of growing crops or soil taken from the land.<sup>19</sup> Here the plaintiff is assumed to have waived the trespass, although, where the entry has occurred under a claim of title, the same issues may be involved. If the defendant, while wrongfully occupying the land, should burn down the timber, he could not be followed out of the jurisdiction, whereas if he cuts it down and disposes of it, he may.<sup>20</sup>

The statute in New York was passed as a result of the decision in *Brisbane v. Pennsylvania Railroad Co.*<sup>21</sup> The defendant had communicated a fire to growing timber upon plaintiff's land in New Jersey. The court recognized that the gravamen of the action was negligence and that only money damages were sought. Title was not involved and the defense did not dispute it in any way. Though recognizing the technical character of the rule and the exceptions to which we have referred, the court felt powerless to change it. Before the end of the year, however, the legislature added a new section to the Code making all actions to recover damages to foreign real estate, or for breach of contracts or covenants thereto, cognizable whenever such an action could be maintained in relation to personal property.<sup>22</sup>

<sup>19</sup> Whidden v. Seelye, 40 Me. 247 (1855); American Union Tel. Co. v. Middleton, 80 N. Y. 408 (1880); Tyson v. McGuineas, 25 Wis. 656 (1870); Ellenwood v. Marietta Chair Co., 158 U. S. 105 (1894); West v. McClure, 85 Miss. 296 (1904).

<sup>20</sup> A further seemingly absurd result of the technical character of the rule appears from *Brereton v. Canadian P. R. Co.*, 29 Ont. Rep. 57 (1913). Action was brought in Ontario for negligently setting fire to plaintiff's house and furniture in Manitoba. The court held that so far as the house was concerned, the action was local, though damage to the furniture gave rise to a transitory action. But as the action was not severable, plaintiff was obliged to abandon his claim for the damage to the house in order to recover for the loss of the furniture.

<sup>21</sup> 205 N. Y. 431 (1913).

<sup>22</sup> N. Y. Code of Civil Procedure, Sec. 982a. The statute has been held not to apply to injury done prior to its enactment. *Jacobus v. Colgate*, 217 N. Y. 235 (1916); *Per Cardozo, J.* "It is not a sufficient answer to say that the old rule was unjust and technical. We may concede that it was." (P. 244.)



The refusal to take jurisdiction because the trial may involve an issue of title to foreign land seems inconsistent with the jurisdiction long exercised in equity where there is no hesitation in compelling a defendant to act or omit to act in respect of foreign land, wherever a cause for the intervention of equity is otherwise sustained. As Chief Justice Marshall said in *Massie v. Watts*:<sup>23</sup> "the circumstances that a question of title may be involved in the inquiry and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction." The equity rule in England has been stated in terms quite as broad.<sup>24</sup> Why then should a foreign trespass be excluded from the jurisdiction of common law courts where the plaintiff seeks only compensation for the injury in money damages? It was indeed suggested by Lord Herschell in the *British South Africa Co. case*, that after a plaintiff who has been expelled from his lands in a foreign jurisdiction has obtained damages in an English court, he might thereafter proceed to repossess himself of his lands.<sup>25</sup> In that event, however, he would find himself in difficulties in either the local or the foreign courts. But Lord Herschell further argues that perhaps the lands may be in an unsettled country "where, to use a familiar expression, the only right is might."<sup>26</sup> This were a hardship indeed and yet his compassion for the defendant is not at all aroused when, in the same opinion, he is called upon to contemplate the situation in Nova Scotia and Labrador where, at the time of Lord Mansfield's decisions, there were no local courts. If title had been involved, Lord Herschell thinks Lord Mansfield would have refused jurisdiction. If we accept Lord Herschell's ruling, however, justice would never triumph. Her sword would be sheathed in the civilized community by a technical rule

<sup>23</sup> 6 Cranch 148 (1810).

<sup>24</sup> "Archer v. Preston, Lord Arglasse v. Muschamp and Lord Kildare v. Eustace clearly show that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situate in England." Sir R. P. Arden, M. R., in *Lord Cranstown v. Johnston*, 3 Vesey 170, 182 (1796).

<sup>25</sup> (1893), A. C., at p. 625.

<sup>26</sup> *Ibid.*, p. 626.

and broken in the foreign country by the reign of might. Even if the foreign country were civilized it would only be necessary for the tort-feasor to escape the jurisdiction where the land is situated and he would again be everywhere immune. The court is confronted by a dilemma the two horns of which are to refuse to redress a wrong otherwise irremediable, or redress it even though the injured party may himself thereafter commit a second wrong. The dilemma should easily be resolved in favor of the second alternative. Story seems to have leaned to this view, although, like Marshall and others, he felt precluded by "the actual jurisprudence of England." In commenting upon the cases cited in *Mostyn v. Fabrigas*, he mentions the rule of Lord Mansfield as having been reversed, "however maintainable it might be upon general principles of international law, if suit were for personal damages only."<sup>27</sup>

We would seem to have here another instance of the survival of a rule of law long after the historical conditions which gave rise to it had disappeared. In referring to the development of the common law, a recent writer has said: "Designed originally to govern purely domestic or internal relations and transactions, the rise of international commerce necessitated the infusion of a system of private international law."<sup>28</sup> The sway of English law, in both hemispheres is for the most part over communities without complete sovereignty and yet completely autonomous in respect of municipal law and jurisdiction. A greater influence of international viewpoints in the administration of private law may confidently be anticipated for the future because of the increasing mobility of population and intercourse and also because of the multiplication of autonomous local jurisdiction, a tendency which the present world outlook may still further develop through the growth of the federal idea in government.

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<sup>27</sup> Conflict of Laws, Sec. 554.

<sup>28</sup> W. W. Billson, *Equity in its Relation to Common Law* (1917), p. 19.